

# NOTICES OF SUPPLEMENTAL PROPOSED RULEMAKING

After an agency has filed a Notice of Proposed Rulemaking with the Secretary of State's Office for *Register* publication and the agency decides to make substantial changes to the rule after it is proposed, the agency must prepare a Notice of Supplemental Proposed Rulemaking for submission to the Office, and the Secretary of State shall publish the Notice under the Administrative Procedure Act (A.R.S. § 41-1001 et seq.). Publication of the Notice of Supplemental Proposed Rulemaking shall appear in the *Register* before holding any oral proceedings (A.R.S. § 41-1022).

## NOTICE OF SUPPLEMENTAL PROPOSED RULEMAKING

### TITLE 2. ADMINISTRATION

#### CHAPTER 5. DEPARTMENT OF ADMINISTRATION PERSONNEL ADMINISTRATION

*Editor's Note: The following Notice of Supplemental Proposed Rulemaking was reviewed per Laws 2009, 3rd Special Session, Ch. 7, § 28. (See the text of § 28 at 15 A.A.R. 1942, November 20, 2009.) The Governor's Office authorized the notice to proceed through the rulemaking process on December 8, 2009.*

[R10-165]

#### PREAMBLE

**1. The *Register* citation and dates for the Notice of Rulemaking Docket Opening, the Notice of Proposed Rulemaking, and any Notices of Supplemental Proposed Rulemaking, if applicable:**

Notice of Rulemaking Docket Opening: 16 A.A.R. 12, January 1, 2010

Notice of Proposed Rulemaking: 16 A.A.R. 7, January 1, 2010

<b><u>2. Sections Affected</u></b>	<b><u>Rulemaking Action</u></b>
R2-5-417	Amend
R2-5-903	Repeal

**3. The statutory authority for the rulemaking, including both the authorizing statute (general) and the implementing statute (specific):**

Authorizing statute: A.R.S. § 41-763(2) and (6)

Implementing statute: A.R.S. § 41-783(17)

**4. The name and address of agency personnel with whom persons may communicate regarding the rulemaking:**

Name: Christine Bronson, Employee Relations Manager

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**5. An explanation of the rules, including the agency's reasons for initiating the rulemaking:**

The Department is initiating this rulemaking to amend the Personnel Rules in order to allow agencies to require covered employees to work reduced hours in the event of a reduction in appropriations for personnel expenses and related benefit costs.

Session laws during two special sessions in 2009 (Laws 2009, 1st Special Session, Ch. 3 and Laws 2009, 3rd Special Session, Ch. 7) permitted agency directors to implement reductions in covered employees' work hours to comply with mandated appropriation reductions for fiscal year 2009-2010 and authorized the Director of the Department of Administration (ADOA) to prescribe procedures to implement the reductions. In accordance with this authority, the ADOA Director implemented a furlough program effective October 17, 2009. Initially, the furlough program would have expired at the end of fiscal year 2010.

Laws 2010, 7th Special Session, Ch. 3 implemented mandatory furloughs through fiscal year 2012 for most state employees and further extended the authority for the ADOA Director to prescribe the procedures by which an agency director could require a reduction in work hours for fiscal year 2010-2011. Adoption of a furlough rule would allow

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agencies to use furloughs as a means of addressing budget reductions beyond the current fiscal year or if funding to pay employees is temporarily suspended, for example, due to the lack of an established federal or state budget.

Adoption of a furlough rule would eliminate the need for R2-5-903, Temporary Reduction in Force, thus, the Department is proposing to repeal this rule. R2-5-903 was adopted in June 1996 as a result of a temporary shutdown of the federal government due to the lack of an established federal budget. However, the need for the rule never materialized and the rule has never been used. The rule requires an agency to calculate retention points for every impacted employee which requires considerable lead time to implement. There are also a number of other issues that make R2-5-903 problematic to implement, such as requiring employees affected by a temporary reduction in force to be separated instead of being placed on unpaid leave status, and, allowing employees to use compensatory leave when in reality, agencies would not have the funding to pay employees for leave taken.

Because a furlough is an involuntary leave of absence without pay rather than a separation, the new rule is being added under Article 4, Leave.

**6. An explanation of the substantial change which resulted in this supplemental notice:**

Based on written and oral comments, the Department made the following changes to the proposed rules:

Preamble

In item 5 of the Preamble of the Notice of Proposed Rulemaking, it was stated that the authorization for a required reduction in work hours and the furlough program procedures implemented by the ADOA Director would expire at the end of fiscal year 2010. The Department updated this information to include legislation passed in a subsequent special session of the legislature which extended this authority for fiscal year 2010-2011.

R2-5-417

The Department substantially amended the rule by deleting the cross-reference to the Department's furlough procedures and guidelines and adding more specific language in the rule. The Department has included in rule: definition of furlough, types of furloughs that may be approved by the ADOA Director, information about furloughs generally, the procedures for an agency head to request approval to conduct a furlough due to reduction of funding or suspension of funding, the procedures for a furlough due to a suspension of funding in the event the state fails to pass a budget, and the procedures an employee may utilize to request a review of the employee's placement on furlough.

**7. A showing of good cause why the rules are necessary to promote a statewide interest if the rules will diminish a previous grant of authority of a political subdivision of this state:**

Not applicable

**8. The preliminary summary of the economic, small business, and consumer impact:**

These rules affect only state agencies and state service employees and will not have a direct impact on small businesses or consumers. Any financial impact or administrative expenses to an agency will be covered by the agency's ordinary operating funds.

**9. The name and address of agency personnel with whom persons may communicate regarding the accuracy of the economic, small business, and consumer impact statement:**

See item 4.

**10. The time, place, and nature of the proceedings for the making, amendment, or repeal of the rules, or if no proceeding is scheduled, where, when, and how persons may request an oral proceeding on the proposed rules:**

An oral proceeding regarding the proposed rules will be held as follows:

Date: January 5, 2011  
Time: 2:00 p.m.  
Location: Department of Administration  
100 N. 15th Ave., Room 204  
Phoenix, AZ 85007

**11. Any other matters prescribed by statute that are applicable to the specific agency or to any specific rule or class of rules:**

None

**12. Incorporations by reference and their location in the rules:**

None

**13. The full text of the changes follows:**

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PERSONNEL ADMINISTRATION**

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**ARTICLE 4. LEAVE**

Section  
R2-5-417.     ~~Repealed Furlough~~

**ARTICLE 9. SEPARATIONS**

Section  
R2-5-903.     ~~Temporary Reduction in Force~~ ~~Repealed~~

**ARTICLE 4. LEAVE**

**R2-5-417.     ~~Repealed Furlough~~**

- A.** Definition. A furlough is the involuntary placement of an employee on leave of absence without pay for budgetary reasons.
- B.** Types of furloughs. A furlough may be authorized by legislative action. In addition, the Director may approve:
1. A reduction of funding furlough that allows an agency head to place employees on furlough for any combination of consecutive or non-consecutive days. There is no maximum number of days an employee may be placed on furlough, but consecutive furlough days shall not exceed five consecutive days or more than one-half the employee's regularly scheduled hours in a pay period, whichever is less; and
  2. A suspension of funding furlough that allows an agency head to place employees on furlough indefinitely until funding is restored.
- C.** General.
1. The total number of days an employee is placed on furlough is based on the reduction or suspension of funding.
  2. A furlough day equals eight hours for full-time employees and is pro-rated for part-time employees. Furlough hours for part-time employees are calculated by multiplying the number of hours the employee is scheduled to work in a week by 0.2. If the calculation results in a fraction, the furlough hours shall be rounded to the nearest whole hour, as follows:
    - a. 0.5 or above is rounded up, and
    - b. Less than 0.5 is rounded down.
  3. A furlough is unpaid.
  4. While on furlough, an employee shall not conduct state work or volunteer to conduct state work, either with or without compensation.
  5. Paid leave may not be substituted for furlough days.
  6. All state service employees within the scope of the furlough shall be subject to the furlough in the same manner. Exceptions may be granted when an agency head determines certain employees within the scope of the furlough have unique knowledge or skills or are considered mission critical and need to be excluded from the furlough.
  7. Unless the employee is in a physician or attorney position, an employee who is in a position that has been determined to be exempt from the provisions of the Fair Labor Standards Act (FLSA) will lose the exemption for any work week in which the employee is furloughed for less than the full work week.
  8. A furlough shall not adversely affect an employee's service anniversary date or create a break in service.
  9. Upon conclusion of the furlough period, an agency head shall return an employee to the employee's status and position held prior to the furlough, unless a personnel action taken in accordance with state service personnel rules authorizes a change to the employee's record.
  10. An employee's failure or inability to return to work upon conclusion of the furlough period may, in accordance with applicable state service personnel rules:
    - a. Result in the employee being placed on leave.
    - b. Be considered a resignation.
    - c. Result in separation without prejudice, or
    - d. Be cause for dismissal.
- D.** Reduction of funding furlough.
1. An agency head shall submit to the Director a furlough plan for approval if the agency head determines a furlough is necessary due to a reduction of funding. An agency head is not required to implement or exhaust other cost-savings measures prior to initiating a furlough plan.
  2. The agency head shall submit the furlough plan for approval at least 30 working days prior to the proposed implementation date of the furlough. If circumstances beyond the agency head's control do not permit at least 30 working days' notice, the agency head shall submit the furlough plan as soon as the agency head is aware of the necessity for the furlough and provide a written explanation of why the 30 working day requirement was not met.
  3. An agency head shall include all of the following in the furlough plan:
    - a. The proposed scope of the furlough plan, which shall be either agency-wide or limited to:
      - i. Agency operations in one or more geographic areas.
      - ii. One or more organizational units of the agency.
      - iii. One or more funding sources.

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- iv. One or more job classes.
      - v. One or more class series, or
      - vi. Any combination of the above.
    - b. If the furlough will not be conducted on an agency-wide basis, each affected:
      - i. Geographic location.
      - ii. Organizational unit.
      - iii. Funding source.
      - iv. Job class, and
      - v. Class series.
    - c. For each affected geographical location, organizational unit, funding source, job class, and class series specified in the furlough plan, the total number of employees scheduled for furlough;
    - d. If requesting any exceptions within the scope of the furlough, the total number of employees within the scope of the furlough, the number of employees for whom an exception is requested, and the reason for the request;
    - e. The number of days and date ranges for the furlough;
    - f. The agency's procedures for scheduling furloughs; and
    - g. The procedures for notifying employees of the furlough.
  - 4. The Director shall review and provide written notification of approval, modification, or denial of an agency's furlough plan within 20 working days of receipt.
  - 5. Upon approval of the Director to conduct a reduction of funding furlough, an agency head:
    - a. May place an employee on furlough for any combination of consecutive or non-consecutive days, subject to the limits in subsection (B)(1);
    - b. Shall determine the scheduling of furloughs that provide for the continuation of any agency operations required by law;
    - c. May cancel or rescind any approved paid or unpaid leave in progress or scheduled for an employee who is designated for furlough and shall notify the affected employee in writing of the cancellation of the approved leave for the duration of the furlough. If the previously approved leave was scheduled to extend beyond the furlough, the employee may return to paid leave status, if available, following the furlough period. If the agency head cancels an employee's paid leave and:
      - i. The employee is on leave pursuant to the provisions of the federal Family and Medical Leave Act (FMLA) during a scheduled furlough day, the furlough day shall not count against the employee's FMLA entitlement and the employee's leave balance shall not be charged for the furlough day; or
      - ii. The employee is on military leave during a scheduled furlough day, the furlough day shall not count against the employee's military leave and the employee's leave balance shall not be charged for the furlough day.
  - 6. Shall prohibit an employee from working during the period of the furlough, unless a work emergency arises. In the event of a work emergency, an agency head may revoke the furlough for an employee in an individual case. An employee whose furlough is revoked due to an emergency shall be paid for time required to work and shall be required to take the furlough on another day, unless otherwise exempted.
- E. Suspension of funding furlough – agency head request.**
- 1. An agency head shall submit to the Director for approval a furlough plan if the agency head determines a furlough is required due to a suspension of funding to pay employees.
  - 2. The agency head shall submit the furlough plan for approval at least 15 working days prior to the proposed implementation date of the furlough. If circumstances beyond the agency head's control do not permit at least 15 working days' notice, the agency head shall submit the furlough plan as soon as the agency head is aware of the necessity for the furlough and provide a written explanation of why the 15 working day requirement was not met.
  - 3. An agency head shall include all of the following in the furlough plan:
    - a. The proposed scope of the furlough plan, which shall be either agency-wide or limited to:
      - i. Agency operations in one or more geographic areas.
      - ii. One or more organizational units of the agency.
      - iii. One or more funding sources.
      - iv. One or more job classes.
      - v. One or more class series, or
      - vi. Any combination of the above.
    - b. If the furlough will not be conducted on an agency-wide basis, each affected:
      - i. Geographic location.
      - ii. Organizational unit.
      - iii. Funding source.
      - iv. Job class, and
      - v. Class series.
    - c. For each affected geographical location, organizational unit, funding source, job class, and class series specified in the furlough plan, the total number of employees scheduled for furlough;

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- d. If requesting any exceptions within the scope of the furlough, the total number of employees within the scope of the furlough, the number of employees for whom an exception is requested, and the reason for the request;
        - e. The procedures for notifying employees of the furlough; and
        - f. The procedures for notifying employees of restoration of funding and when to return to work.
      - 4. The Director shall review and provide written notification of approval, modification or denial of an agency's furlough plan within 10 working days of receipt.
      - 5. Upon approval of the Director to conduct a suspension of funding furlough, an agency head:
        - a. Shall freeze all personnel actions except for those actions that would accomplish, or assist in accomplishing the purpose of the furlough;
        - b. May place employees on furlough indefinitely until the reason for the furlough is abated;
        - c. Shall notify affected employees of the furlough and that while on furlough, an employee:
          - i. Shall not report to work or work from any location until notified to return to work; and
          - ii. Will not receive pay for any unused and unforfeited annual leave, should the employee resign or be terminated, until funding is restored;
        - d. May cancel or rescind any approved paid or unpaid leave in progress or scheduled for an employee who is designated for furlough and shall notify the affected employee in writing of the cancellation of the approved leave for the duration of the furlough. If the previously approved leave was scheduled to extend beyond the furlough, the employee may return to paid leave status, if available, following the furlough period; and
        - e. Shall notify employees upon restoration of funding and when to return to work.
- E. Suspension of funding furlough – failure to pass state budget. If the state fails to pass a budget and funds are not appropriated for the following fiscal year, the Director may authorize an agency head to implement a suspension of funding furlough. Upon such notification by the Director, an agency head:
  - 1. Shall freeze all personnel actions except for those actions that would accomplish, or assist in accomplishing the purpose of the furlough;
  - 2. Unless an exception has been authorized as provided in subsection (F)(4), shall place all employees on furlough indefinitely until the reason for the furlough is abated;
  - 3. Shall require all employees to be subject to the furlough in the same manner;
  - 4. May establish exceptions when only a portion of the employees in a particular class are necessary to perform mission critical services;
  - 5. Shall notify affected employees of the furlough and that while on furlough, an employee:
    - a. Shall not report to work or work from any location until notified to return to work; and
    - b. Will not receive pay for any unused and unforfeited annual leave, should the employee resign or be terminated, until funding is restored;
  - 6. Shall cancel or rescind any approved paid or unpaid leave in progress or scheduled for an employee who is designated for furlough and shall notify the affected employee in writing of the cancellation of the approved leave for the duration of the furlough. If the previously approved leave was scheduled to extend beyond the furlough, the employee may return to paid leave status, if available, following the furlough period; and
  - 7. Shall notify employees upon restoration of funding and when to return to work.
- G. Employee request for review.
  - 1. An employee may submit an accelerated request for review of the employee's placement on furlough. The employee shall make the request for review in writing to the agency head no later than three working days after the employee's receipt of a furlough notice. The employee shall limit the request for review to the determination resulting in the employee's furlough and include a proposed resolution.
  - 2. The agency head shall provide a written response to the employee with a final decision within:
    - a. Five working days after receipt of the request if a reduction of funding furlough.
    - b. Fifteen working days after the employee returns to work if a suspension of funding furlough.
  - 3. A request for review shall not delay implementation of the furlough.

**ARTICLE 9. SEPARATIONS**

**R2-5-903. ~~Temporary Reduction in Force Repealed~~**

**~~A. General~~**

- ~~1. When funding necessary to pay employees is suspended or reduced, a temporary reduction in force may be conducted and shall be processed in accordance with the provisions of this Section.~~
- ~~2. If funding to pay employees is suspended or reduced, an agency head may request approval from the Director to conduct a temporary reduction in force. The agency head shall submit to the Director the plan and procedure the agency proposes to follow. The plan and procedure shall state:~~
  - ~~a. The reason for the temporary reduction in force;~~
  - ~~b. Each budget program affected;~~
  - ~~c. The classes affected;~~
  - ~~d. The amount of shortfall, total number of employees affected, and name and Fair Labor Standards Act status of~~

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- each affected employee;
  - e. The unit, for example, budget program, class, class series or agency, subject to or affected by the temporary reduction in force and number of employees in the affected unit;
  - f. When the agency was notified of the funding suspension or reduction;
  - g. Assessment of the impact of a temporary reduction in force on the agency's ability to deliver essential services;
  - h. What alternatives have been considered and why they were rejected;
  - i. The number of funded, vacant positions within the agency, what efforts the agency has made to place employees in other positions within the agency or other state agencies;
  - j. Expected outcome of the proposed action; and
  - k. A summary of funding discussions with the Department of Administration Finance Division.
3. An agency head shall not initiate or implement a personnel action that will affect the temporary reduction in force after the date of the agency head's request to the Director for a temporary reduction in force except to process a personnel action to accomplish, or to assist in accomplishing, the purpose of the temporary reduction in force. The agency head shall give employees subject to a temporary reduction in force preference for placement in any funded vacant positions within the agency for which they qualify. Preference for placement shall be based upon retention points.
4. A temporary reduction in force shall not exceed 30 working days from the date of implementation of the plan. If the agency is advised at any time during the temporary reduction in force is in effect that funding for affected positions will be terminated or permanently reduced, an agency head shall plan and conduct a reduction in force as prescribed by R2-5-902, unless the agency makes other arrangements to delay a reduction in force.
5. An agency head shall not approve the use of any paid leave except compensatory leave for an employee who is designated for temporary reduction in force. An approved paid or unpaid leave in progress for an employee who is designated for temporary reduction in force shall be cancelled effective the day that the temporary reduction in force begins. The agency head shall notify the affected employee in writing of the cancellation of the approved leave.
6. Pay for time on temporary reduction in force may only be restored to an employee if, and to the extent which, federal or state law specifically authorizes payment.
7. An employee affected by a temporary reduction in force pursuant to this Section shall return to work in the same position occupied at the start of the temporary reduction in force if funding is fully restored, sufficient attrition has occurred, or an alternate source of funding becomes available.
8. Failure or inability to return to work on the effective date of return may be considered a resignation, result in separation without prejudice, or be cause for dismissal as determined by the agency head consistent with the agency policies, procedures, and guidelines. An employee who is unable to return to work due to a non-job-related medical condition shall provide to the agency head a written statement from a licensed health care practitioner substantiating the employee's inability to return to work.
- B. Administration.** The Director shall administer a temporary reduction in force in the following manner:
- 1. In an agency affected by a temporary reduction in force, employees shall be separated in the order listed below before any action is taken that affects permanent status employees, providing the separation of these employees will accomplish, or assist in accomplishing, the purpose of the temporary reduction in force:
    - a. Permanent status employees who volunteer for a temporary reduction in force;
    - b. Provisional employees;
    - c. Clerical pool employees;
    - d. Temporary employees;
    - e. Seasonal employees;
    - f. Original probationary employees;
    - g. Limited employees.
  - 2. Retention points shall be used to identify full-time or part-time permanent status employees to be placed on temporary reduction in force based on the employee's relative standing on the retention list. Identification of employees to be placed first on temporary reduction in force shall begin with the employee with the lowest number of retention points.
  - 3. Retention points shall be based on length of state service and performance, calculated in accordance with subsections (C), (D), and (E) below.
  - 4. Employees on promotional probation, detail to special duty, or underfilling a position shall compete for retention in their promotional probation, detail to special duty, or underfill classes.
- C. Calculation of retention points for length of service.**
- 1. Each permanent status employee shall be awarded 1 retention point for each year of state service. Service of more than six months shall be counted as one year. Service of six months or less shall not be counted.
  - 2. Periods of service as a state service employee prior to a resignation or dismissal shall not be counted.
  - 3. Periods of state service as a provisional, seasonal, temporary, limited, or clerical pool employee shall not be counted.
  - 4. Periods of military leave with or without pay shall be counted.
  - 5. Periods of service on mobility assignment shall be counted.

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6. Continuous uninterrupted service in a position prior to its transfer to state service by legislative action or otherwise from a budget unit of the state shall be counted.
- D.** ~~Calculation of retention points for performance. The most recent performance evaluation concluded prior to the date of the request for temporary reduction in force shall be used in determining retention points. If any employee has not had a performance evaluation in the past 12 months, the employee shall be awarded 12 retention points. Retention points for performance shall be awarded as follows:~~
1. ~~Each employee having an overall performance evaluation of standard or above shall be awarded 12 retention points;~~
  2. ~~Each employee having an overall performance evaluation of less than standard shall be awarded 0 retention points.~~
- E.** ~~Resolution of ties. Ties in total retention points shall be broken in the following manner and order:~~
1. ~~Tie shall be broken by the employee with the highest overall performance rating in the class currently held by the employee;~~
  2. ~~If a tie continues to exist, the tie shall be broken by the employee with the earlier initial state service hire date of record;~~
  3. ~~If a tie continues to exist, it shall be broken by lot.~~
- F.** ~~Notice of separation due to temporary reduction in force. The agency shall provide the employee with a written notice of separation as soon as practical after the plan is approved. The notice shall include, at a minimum, the effective date of the separation and the right to request a review of the separation.~~
- G.** ~~When funding necessary to pay the employee is restored, the temporary reduction in force expires, or the agency head otherwise determines that an employee may be recalled, the agency shall provide the employee written notice.~~
- H.** ~~Employee request for review. An accelerated review process shall be established for temporary reduction in force. No later than three working days after receipt of a temporary reduction in force notice, an employee may submit to the agency head a written request for a review of the determination resulting in the employee's temporary reduction in force and a proposed resolution. The agency head shall respond to the employee with a final decision within three working days after receipt of the request for a review. The request for review shall not delay implementation of the temporary reduction in force.~~